82-1989

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE HONORABLE BENNETT H. BRUMMER, Public Defender of the Eleventh Judicial Circuit of Florida and BARRY WEINSTEIN AND WILLIAM PLOSS, Assistant Public Defenders of the Eleventh Judicial Circuit of Florida,

Petitioners,

vs.

STATE OF FLORIDA ex rel. JIM SMITH, Attorney General of the State of Florida, PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, THOMAS J. KELLY, JOSEPHINA PEREZ, JAMES SUSSEX, and ARMANDO MERINO,

Respondents.

RESPONSE OF RESPONDENT STATE OF FLORIDA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT TO PROHIBIT FLORIDA PUBLIC DEFENDERS FROM FILING ANY CLASS ACTION SUITS ON BEHALF OF A CLASS OF INDIVIDUALS VIOLATES THE RIGHT TO INDEPENDENT COUNSEL AND ACCESS TO COURT GUARANTEED INDIVIDUALS BY THE SIXTH AND FOURTEENTH AMENDMENTS.

PARTIES TO THE PROCEEDINGS

Respondents accept the list of all parties appearing on Page ii of the Petition.

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PRELIMINARY STATEMENT

Respondents accept that portion of the Petition for Writ of Certiorari setting forth the opinion in the court below and Constitutional and Statutory Provisions Involved found on pages 1 and 2 through 4, of the Petition.

JURISDICTION

Respondents cannot accept Petitioner's assertion that this Court's jurisdiction has been properly invoked pursuant to 28 U.S.C. §1257(3), in that Petitioner has failed to present a substantial federal question entitling him to this Court's exercise of its jurisdiction. The Florida Supreme Court in State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982) rehearing denied March 3, 1983, resolved the question of whether a Florida

Public Defender may file a class action suit adversely to petitioners on separate, adequate and independent state grounds. Specifically, the court held:

> "...The Florida Statutes remind us that the public defender does not owe any responsibility to persons other than those who he is appointed to represented and he is not authorized by statute to undertake representation of any such additional persons. He therefore cannot undertake representation of a class.
>
> Our reasoning in the case at bar paralleled that which was used in our decision of Graham v. State, 372 So.2d 1363 (Fla. 1979). There, concluded that the State of Florida is under no obligation to provide the counsel or cost in Federal proceedings."
>
> 426 So.2d

In Michigan v. Long, __U.S.__, 103 S.Ct. 3469 (1983) the court stated:

> "...If the state court decision indicates clearly and expressly that it is alternatively based on bona

> fide separate, adequate and independant grounds, we, of course, will not undertake to review the decision."
>
> at 103 S.Ct.Rep.3476

See also Florida v. Casal, __U.S.__ 103 S.Ct.Rep. 3100 (1983).

STATEMENT OF THE CASE

Respondents do not accept the Statement of Facts as presented by Petitioners and would tender the following facts as set forth by the Supreme Court of Florida in its opinion in State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982):

> "Respondents were appointed to represent a minor, G.A. in a Chap. 394 Involuntary Commitment proceeding. Although he was committed at the conclusion thereof, G.A. was later ordered released by the Dade County Circuit and has remained at liberty ever since.
>
> In addition to representing him in

the above proceedings, Respondents filed suit on behalf of G.A. and all others that were similarly situated in the United States District court alleging violations of Constitutional rights and seeking declaratory and injunctive relief. The suit was instituted by R.A., G.A.'s mother. A Motion for Class Certification was additionally filed as well as a Motion for Leave to Proceed in Forma Pauperis. The latter motion was initially granted but later, on a motion by the opposing parties, was vacated.

Subsequent to the above, G.A. and R.A. filed an amended complaint, seeking damages, in the federal proceeding. That pleading was signed by two of the respondents and by Eugene Zenobi, a private practioner not employed by the Public Defender's office. Relators then brought this quo warrranto proceeding to challenge respondent's authority to initiate the Federal proceedings in the form of a class action suit.

It is the petitioner's contention that the public defender is not authorized to bring a class action suit, particularly when there is not showing that each member of the purported class is indigent and when there is not showing that the public defender that was ever appointed to represent in any proceeding, any member of the class other than the named plaintiff.

Respondents counter by arguing that the bringing of a class action was the most efficient way to represent these individuals with the limited resources of the Office of the Public Defender."

426 So.2d at 532

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's response to the Rule to Show Cause issued pursuant to Respondents' Petition for Writ Quo Warranto set forth three grounds upon which they asserted the Quo Warranto Petition should be denied. Specifically (1) the statutory duty of the public defender to represent indigent persons in involuntary hospitalization proceedings necessarily includes authorization to maintain Federal civil litigation on collateral issues substantially related to the purpose of appointment; (2) the public defender's clients, like all other persons, enjoy a fundamental right of access under the Federal and State Constitutions to all legal remedies, without regard to whether those remedies are designated as civil; and

(3) the ethical obligations of the public defender require that he be permitted to bring civil suits on both direct and collateral issues which are substantially related to the purpose of his appointment in an involuntary hospitalization proceeding.

Digesting the aforementioned, Petitioners argued that as to the public defender's statutory duty to represent indigent persons in Federal civil litigation:

> ".. Section 27.51(1)(d) Fla.Stat. (1979) requires the public defender to represent indigents in involuntary hospitalization proceedings. Nothing in this statute limits the representational authority of the public defender. It is axiomatic that the establishment of the duty to represent necessarily carries with it the inherent power to initiate and engage in all litigation necessary to the complete exercise of this mandate which does not conflict with another law or public policy."

Next, Petitioners asserted that the public defender's clients are entitled to a fundamental right of access under the federal and state constitutions and that:

> "...Civil rights action instituted on behalf of G.A. is no different from the federal and state civil litigation regularly engaged in by the public defender on behalf of ingents subjected to criminal prosecutions. This court's decision in Schulman v. State, supra, requires that the instant case be treated identically."

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Finally, the Petitioners argue that their ethical obligation to represent indigent clients or clients involved in involuntary hospitalization proceedings "enjoy the same attorney/client relationship and incurs the same ethical obligation, as his counterpart in private practice. Citing to Ferri v. Ackerman, 444 U.S. 192 (1979) Petitioners argue that a person

represented by a public defender deserves no less representation than an individual represented by privately retained counsel. A35-36.

The Florida Supreme Court in State ex rel. Smith v. Brummer, supra, in reviewing each of the aforementioned theories concluded that while the state was constitutionally obligated to respect the professional independence of public defenders whom it engages, the Public Defender's Office in Florida must have authority to act. Whereas here Florida Statutes do not provide authority for a public defender to initiate class action where the class has not even defined, "...The State of Florida is under no obligation to provide the counselor cost in Federal proceedings." 426 So.2d at 533. The Florida Supreme Court

further noted that the decision in State ex rel. Smith v. Brummer did not limit the public defender's ability to represent and seek Federal relief for a client on an individual basis.

> "A lawyer's professional responsibility may dictate this action. It is, however, our view that a state court could not mandate this action."
>
> 426 So.2d at 533.

It is apparent from the opinion rendered in State ex rel. Smith v. Brummer, supra, that though couched in constitutional niceties, the Federal Question presented herein was not decided as a Federal issue but rather was decided on State law.

REASONS THE WRIT SHOULD NOT BE GRANTED

Respondents would assert that this Court's recent decision in Michigan v. Long, __U.S.__ 103 S.Ct. 3469 (1983) eliminates any need for further review of the instant petition. The Florida Supreme Court in State ex rel. Smith v. Brummer, 426 So.2d at 533 in granting the State's Petition for Writ of Quo Warranto held:

> "Our reasoning in the case at bar paralleled that which was used in our decision of Graham v. State, 372 So.2d 1363 (Fla. 1979). There, we concluded that the State of Florida is under no obligation to provide the counsel or costs in Federal proceedings.
>
> The decision to file this Federal complaint as a class action suit is said to be a tactical move on the part of the respondent. Respondents have based their decision on the likely of obtaining relief for both G.A. and other individuals. The mere fact that a decision is tactical is

of no import. Invariably, the Respondents must still have the authority to act and here they simply do not.

This does not mean, however, that State appointed counsel could not continue their representation and seek Federal relief on an "individual" basis..."

In Michigan v. Long, the Court speaking through Justice O'Connor revisted the question of whether this court should invoke its jurisdiction where there is a question as to whether independent state grounds exist in support of the issue before the court. "If the State court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course will not undertake to review the decision." 103 S.Ct.Rep. at 3476.

Here as evidenced by the aforenoted quote from the Florida Supreme Court's opinion, the resolution that public defenders are without authority to bring civil class action suits in Federal Court, is predicated on the statutory authority provided pursuant to Fla.Stat. 27.51, rather than any limitation to an individual's constitutional right to access to courts.

Sub judice Petitioners instituted a civil proceeding in the United States District Court for the Southern District of Florida by filing a complaint seeking declaratory and injunctive relief. The complaint challenges the constitutionality of certain policies, practices and procedures allegedly employed by the Respondents in providing psychiatric treatment to adolescents. In addition to said petition a Motion for Class Certification, a

memorandum of points and authorities in support of that motion and a Motion for Leave to Proceed in Forma Pauperis was filed in Case No. 80-2294-CIV-EBD.

Prior to the filing of the Federal Civil complaint, Petitioners' client, G.A., had been hospitalized in the Adolescent Unit of the Psychiatric Wing of Jackson Memorial Hospital. G.A. had been initially admitted as a voluntary patient at the request of his mother, R.A. R.A. became dissatisfied with the manner in which her son was being treated and sought to remove him from the hospital. Believing G.A. was to be committed under Florida's Baker Act, Fla.Stat. §934, the hospital officials, sought to have G.A. involuntarily committed. The public defender was appointed to represent G.A. in the commitment proceedings. The commitment proceedings resulted in the issuance of an Order for

Involuntarily Commitment for G.A. Subsequently however, a Petition for Writ of Habeas Corpus was filed in G.A.'s behalf and as a result G.A. was ordered released with the granting of said pleading.

Respondents in the Federal litigation opposed class certification urging that since G.A. had been released from custody the issue was moot. Respondents further sought an order denying G.A.'s request to proceed in forma pauperis and fought to have the public defender disqualified as counsel for G.A. The motion to disqualify was denied, based on the fact that the matter should properly be presented to the State court. The Court also vacated its prior order allowing G.A. to proceed in forma pauperis.

An amended complaint was filed seeking damages.

As observed in Graham v. Vann, 394 So.2d 176, 177 (Fla. 1st DCA 1981) the Office of the Public Defender is a creature of Article V, Section 18 Fla.Const. and has no authority outside that provided by statute. See Office of the Public Defender v. Baker, 371 So.2d 684 (Fla. 4th DCA 1979). The scope of the Florida Public Defender's Office is limited in accordance with the general principles applicable to the powers of any State official. These powers are prescribed by the Constitution or by statute, or both, and are measured by the terms and the necessary implications of the grant and must be executed in the manner directed. This statutory grant of authority which is defined and limited by statute is not unique to Florida. Hayes v. State, 599 P.2d 569 (Wyoming 1979); Alaska Public Defender Agency v. Superior Court, 584 P.2d 1106 (Alaska 1978); Lee v. Superior Court in and for Maricopa County,

472 P.2d 34 (1970); Norton v. State, 40 A.2d 801 (N.J. 1979); and State v. Anonymous, 279 A.2d 574 (Connecticut 1971).

In Florida §27.51(1) Fla.Stat. sets forth the authority from which a public defender obtains authority to act in Florida. The Florida Supreme in State ex rel. Smith v. Brummer, supra, in acknowledging that "The State is constitutionally obligated to respect the professional independence of the public defender whom it engages", further observed as noted in Polk County v. Dobson, 454 U.S. 312 (1981) quoting from Ferri v. Ackerman, 444 U.S. 193, 204, that the public defender's principle responsibility is to serve the undivided interest of his client.

In Florida, a public defender has no authority to institute proceedings in Federal Court other than those set out by

statute. Especially in the instant case where the public defender has sought to institute a civil proceeding in Federal court representing a "class" of individuals all of whom do not fall within the public defender's authority to represent. As observed in Thompson v. Office of the Public Defender, 387 So.2d 541, 543 (Fla. 5th DCA 1980) the Office of the Public Defender in Florida was created as a result of United States Supreme Court cases requiring counsel for all indigent defendants charged with crimes punishable by incarceration. In the instant cause the public defender was responsible for representing G.A. during the involuntary commitment for hospitalization but not to promote a cause celebre in attempting to right the wrongs of the practices of the Psychiatric Unit of Jackson Memorial Hospital. As observed in Branti v. Finkel, _U.S.__ 100 S.Ct. 1287, 1295 (1980), "The primary, if not the only,

responsibility of an assistant public defender is to represent individual citizens in controversy with the state." Clearly a public defender does not owe any responsibility to persons other than those who he is appointed to represent. He is not authorized by statute to undertake representation of any such additional persons, especially when the "suspect class" has not been certified. More importantly there has been no showing that all members of the class are qualified to be represented by the Public Defender's Office in Florida. See §27.51(2) Fla.Stat.

Moreover, the writ should not be issued in the instant cause because the issue is moot. Petitioners acknowledge in Footnote 7 of their petition, p.13 that G.A. was eventually released from Jackson Memorial Hospital on a Writ of Habeas Corpus. They argue therein that the

issue is not moot for two reasons. First, because the State of Florida "still remains free to bring another commitment proceeding against G.A."; and second, even if the matter is moot with respect to G.A. other members of the class pursuant to Sosna v. Iowa, 419 U.S. 393 (1975) and Gerstein v. Pugh, 420 U.S. 103 (1975) continue to "present a live controversy which outlasted the mootness of the main representative's claim". Respondents would disagree and submit first that no certification of a class ever obtained in the instant cause and the fact that the public defender was denied the ability to continue the class action did not and would not eliminate the ability of those unnamed class members to obtain class certification. Secondly, the matter is moot as to G.A. the only recognized client of Petitioners in that alternative available state remedies were utilized by Petitioners to obtain G.A.'s

release. The fact that future proceedings may commence against G.A. for commitment by the State is too remote to deny mootness in light of the facts and circumstances which could develop pertaining to future commitment.

Moreover, Fla.Stat. §27.51(1) clearly contemplates only representation continue in situations in which a case is pending and the result of that case will have a direct impact on the public defender's client. No such showing has been made nor can be made. Likewise, the public defender is not authorized to represent any person in any proceeding without a specific appointment regarding that proceeding. Once G.A. was released from the commitment confinement the public defender's responsiblity for G.A. terminated. Reappointment would have to occur on any future efforts by the State to

recommit G.A. to involuntary hospitalization.

Further, Respondent challenged Petitioners' standing to assert the Sixth and Fourteenth Amendment rights of G.A. and all other indigents. Although cognizant of decisions in Craig v. Boran, 429 U.S. 190 (1976) and Eisenstaldt v. Baird, 405 U.S. 438 (1972), Respondents would urge that the decision in United States v. Raines, 362 U.S. 17, 21 (1960) controls. See also Craig v. Boran, 429 U.S. at 196 Footnote 4.

Assuming for the moment that this Court rejects each of Respondents' previous reasons for denying the writ, a cursory review of the grounds upon which Petitioners' allege relief should be granted equally evidences no merit to the claims presented. Condensed Petitioners argue that the Florida Supreme Court decision to

prohibit public defenders from filing class action suits violates the right to counsel guaranteed by the Sixth and Fourteenth Amendments requiring counsel to be independent of State control. Citing to Polk County v. Dobson, supra, Petitioners argue that the Supreme Court's decision fails to acknowledge the independent nature of the Public Defender's Office in prosecuting clients' case and therefore inherent in prohibiting class action suits denies the independence required under Polk County v. Dobson, supra. Such a result is erroneous. The Florida Supreme Court recognized the independence a public defender must possess in representing their client but specifically highlighted that representation belongs to the public defender's client.

The Florida Supreme Court acknowledged the need for independency of thought in carrying out the Canons of Professional

Responsibility in behalf of a public defender's client, however concluded that serving one's client did not extend to asserting class actions where the class was not common and no authority existed statutorily to permit the public defender to extend its jurisdiction beyond an appointed client. Indeed sub judice, the proper clients of a Public Defender's Office, indigents, are cheated when the Public Defender's Office seeks to represent those individuals either not indigent or not properly appointed. While the right to counsel means the right to an attorney who is independent of tactical control by the State, that right does not mean many should suffer because the public defender determines based on "tactical choices" they should extend themselves to represent a nebulous class or even noteworthy cause.

Beyond saying it's so, Petitioners

failed to demonstrate how "the decision of the Florida Supreme Court conflicts with the decisions of this court construing the right to counsel secure for indigents under the Sixth and Fourteenth Amendments because it does not respect and preserve from State control the independent professional judgment of the public defender". Clearly the public defender was able to defend G.A. sub judice by filing a Petition for Writ of Habeas Corpus in State court which resulted in G.A.'s immediate release from the involuntary commitment. Moreover, as noted by the Florida Supreme Court in its decision there is no bar as suggested by amicus curiae for Petitioners that "the denial to the public defenders of the right to seek available and proper Federal remedies will inevitably result in the deprivation to their clients of effective remedies available to litigants who have private counsel either retained or appointed to represent

them". Further, it is interesting to note sub judice that when the Federal complaint was amended seeking money damages G.A. and his mother, R.A., and the undefined class were represented by private counsel, Mr. Eugene Zenobi.

Citing to Bounds v. Smith, 430 U.S. 817 (1977) and Wolff v. McDonnell, 418 U.S. 539 (1974) Petitioners' argue:

> "...To allow the State to define by statute the persons the public defender must represent to limit by appropriations the resources he has available to conduct his representation, to restrict by writ the legal tactics he may use in representing his client, affords too much power to the State. It threatens to place an intolerable obstacle in the path of indigents seeking meaningful access to the courts through an effective independent.
>
> In essence, Petitioners argue the elimination of the ability to file a Federal civil rights class action totally emasculates their ability to represent clients pursuant to their

> ethical responsibilities. While it may be true the Federal Courts look with favor and recognize the special importance of class actions in civil rights cases, G.A. was the only client the Public Defender's Office was appointed to represent. Individually, he did not represent a class nor was a class certified sub judice. Relief was obtained for G.A. but without having to proceed with a class action suit. Clearly G.A.'s right to access to the courts were not impaired. Nor does the instant case present a circumstance that class representation makes it easier to bring claims on behalf of large numbers of indigents which would otherwise be too expensive to bring on an 'individual' basis."

Lastly, Petitioners argue that there is a greater issue involved that "this case is of fundamental importance because all Florida Public Defenders are now prohibited from filing class action suits on behalf of their clients". While it is true that the Florida Supreme Court in State ex rel. Smith v. Brummer concluded the public defender had no statutory authority to file and represent individuals in Federal

civil class action suits, Petitioners remedy lies with the State Legislature's enacting legislation to expand the public defender's authority, rather than this Court's reviewing a strictly state law question. See Office of Public Defender v. Baker, 371 So.2d 684 (Fla. 4th DCA 1979) wherein the Office of the Public Defender challenged the right of the Circuit Court to appoint the Public Defender's Office to represent a juvenile in a dependency matter. The court observed:

> "...Section 27.51 Fla.Stat. (1977) defining the duties of Public Defender remains in effect. There is nothing in this statute giving the Public Defender the duty to represent a child alleged to be dependent. There is nothing in Chap. 39 or in Chap. 27 giving the Circuit Court the power to appoint the Public Defender in such cases. We hasten to point out that this decision deals soley with the public defender's statutory duty to represent. We are not here faced with the question of the constitutional right of counsel of either the child or the parents.

The Petition for Writ of

Prohibition is granted. The order appointing the Public Defender is vacated."

371 So.2d at 686.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

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